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In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERAMERICAN AIR FREIGHT CORPORATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The findings and order of the Civil Aeronautics Board (Pet. App. 1-14) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on November 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 1006(a) of the Federal Aviation Act and this Court's decision in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, preclude judicial review of an order of the Civil Aeronautics Board, approved by the President, which granted a foreign resident of the United States a permit to engage in international air freight forwarding, but denied similar authority to a California corporation controlled by that foreign resident.

STATUTES INVOLVED

Sections 801 and 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1461 and 1486, are set forth in the Appendix (*infra*, pp. 13–14). The Board's economic regulations appear in 14 C.F.R. Part 297.

STATEMENT

This case involves the disposition by the Civil Aeronautics Board and the President of alternative applications for authority to conduct air freight forwarding operations between the United States and foreign points. In an order approved by the President, the Board denied the application of petitioner Interamerican Air Freight Corporation, a California corporation organized and controlled by Willy Peter Daetwyler, a Swiss resident of the United States, for authority to conduct such operations as a citizen air carrier, but granted Daetwyler's alternative application for a foreign air carrier permit authorizing him to do so as an individual.

1. The Federal Aviation Act of 1958 (49 U.S.C. 1301, *et seq.*) sets up a comprehensive scheme for regulating domestic and foreign air transportation. Section 401 of the Act (49 U.S.C. 1371) provides that a United States citizen air carrier may not engage in any air transportation (domestic or foreign) without a certificate of convenience and necessity issued by the Board. Section 801 (49 U.S.C. 1461) requires approval by the President of any order granting or denying a certificate to a citizen air carrier authorizing foreign air transportation. Such orders are not subject to judicial review. *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103.

Non-citizen (foreign) air carriers may not engage in domestic air transportation, but they may engage in foreign air transportation, *i.e.*, service between the United States and foreign points. Section 402 of the Act (49 U.S.C. 1372) provides that a foreign air carrier wishing to engage in foreign air transportation must obtain a permit from the Board. The grant or denial of a foreign air carrier permit must also be approved by the President under Section 801 of the Act (49 U.S.C. 1461). Section 1006(a) of the Act (49 U.S.C. 1486(a)) expressly precludes judicial review of "any order in respect of any foreign air carrier subject to the approval of the President * * *."

Authorization from the Board is required by persons engaged "indirectly" in air transportation (*e.g.*, air freight forwarders), as well as by those engaged "directly" in air transportation (*i.e.*, operators of aircraft). Section 101(3) of the Act (49 U.S.C. 1301(3)),

however, authorizes the Board to exempt citizen air carriers "not directly engaged in the operation of aircraft" from the certificate requirement of Section 401 of the Act (49 U.S.C. 1371). Acting under this authorization the Board has promulgated regulations exempting citizen air freight forwarders from the certificate requirements of Section 401, and providing for a system of non-certificated licensing for citizen air carriers for both domestic (14 C.F.R. Part 296) and foreign (14 C.F.R. Part 297) air freight forwarding operations. Unlike orders issued under Section 401 granting or denying certificates for foreign operations, orders granting or denying exemptions for such operations are not required by the Act to be approved by the President. See, *Pan American World Airways* v. *Civil Aeronautics Board,* 261 F. 2d 754 (C.A.D.C.), certiorari denied, 359 U.S. 912.

Since the Act contains no provision authorizing the Board to exempt foreign air carriers from the Act's requirements, there is no regulation comparable to Part 297 for foreign air freight forwarders. Their operations, like those of foreign direct air carriers, must be authorized by a foreign air carrier permit, issued, with the President's approval, under Section 402.

2. Willy Peter Daetwyler, doing business as Interamerican Airfreight Co. (the "Company"), is a Swiss citizen who had been conducting foreign air freight forwarding operations since 1965 under a foreign air carrier permit granted to him pursuant to Section

402.[1] In 1970 Daetwyler filed an application for renewal of his Section 402 permit. At the same time, an alternative application was also filed by petitioner, Interamerican Air Freight Corporation ("IAF"), requesting authorization as a United States citizen, pursuant to Part 297 of the Board's economic regulations, to conduct foreign air freight forwarding operations.

IAF is a California corporation organized by Daetwyler in 1970 for the avowed purpose of succeeding to the business of the Company, but as a United States citizen forwarder operating under Part 297. To this end, IAF had concededly been structured to meet the literal definition of "citizen of the United States" set forth in Section 101(13) of the Act (49 U.S.C. 1301(13)),[2] and Part 297 of the Board's regulations (14 C.F.R. 297.1).

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[1] The Section 402 permit was issued by the Board pursuant to C.A.B. Order E–21914, approved by the President on March 16, 1965. It was issued to Mr. Daetwyler in his individual capacity rather than to another corporation then controlled by him (Interamerican Forwarding Corporation) because the Board determined, *inter alia*, that the grant of a foreign air carrier permit to a United States corporation controlled by a foreign national would be contrary to the public interest (Order E–21914, at 5–6).

[2] Section 101(13) provides that:

> "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by

At the consolidated hearing on the two applications, the opponents of the IAF application contended that Daetwyler was in a position to exercise control over the affairs of IAF and that the grant of Part 297 authority to a corporation controlled by a foreign national would not be consistent with the "public interest" (see 14 C.F.R. 297.34).[3]

While recognizing that the inference of control of IAF by Daetwyler "is not without reason and logic," the hearing examiner drew the opposite inference because, in his view, there was no indication of a devious purpose in adoption of the corporate form and no indication of any harmful result. He therefore recommended grant of IAF's application under Part 297 (and consequent dismissal of Daetwyler's alternative Section 402 application).

The Board agreed with its hearing examiner on the underlying facts, but reached a contrary conclusion on

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persons who are citizens of the United States or of one of its possessions.

The principals of IAF were:

Stockholder	Citizenship	Percentage of stock ownership	Office and directorships
Daetwyler	Swiss	25	Director.
Pittman	United States	5	Do.
Stapleton	do	30	Director and Secretary-Treasurer.
Saxer	do	20	President.
Wintsch	do	15	Vice President.
Schmid	do	5	Vice President—Accounting and Assistant Secretary.

[3] If, indeed, such control would permit a finding that IAF was a United States citizen within the meaning of Section 101(13).

the question of control, a conclusion which the hearing examiner himself indicated would be rational and logical. The Board found that Daetwyler "would be in a position to sufficiently influence decisions of the board of directors and officers of [IAF] so as to constitute control under the Federal Aviation Act" (Pet. App. 5). See 49 U.S.C. 1383.[4] With respect to IAF's application for Part 297 authority, the Board found that "wholly aside" from IAF's technical citizenship status, "the effect of granting a U.S. citizen operating authorization, under the circumstances present here, would be to permit foreign control of carriers licensed by the U.S. as U.S. carriers" (Pet. App. 6–7). It concluded that "[s]uch a result, regardless of technical qualifications under section 101(13), [would be] contrary to Congressional policy, and, therefore, similarly contrary to the public interest" (Pet. App.

[4] This conclusion rested primarily on the following facts (Pet. App. 4–5):

1. IAF was the "direct successor" of the Daetwyler-controlled Company and was "created wholly at the instance of Daetwyler";

2. Daetwyler had retained the maximum formal control permitted by the literal terms of the statutory definition of "United States citizen";

3. IAF would "continue to do business as part of the system of Daetwyler controlled companies";

4. The existence of "close personal relationships" between Daetwyler and the other principals of IAF; and

5. The principals (with the exception of Daetwyler's "long-time attorney in both corporate and personal matters") were employees of other Daetwyler-controlled companies who derive most of their income from such other companies and who had "interests which could be expected at the very least to represent a substantial inducement upon such employees to follow the wishes of Daetwyler."

7).[5] The Board accordingly denied the IAF application, but granted Daetwyler's application for renewal of his foreign air carrier permit (Pet. App. 7–8).

The Board's opinion and order were adopted on September 17, 1971, and transmitted to the President for his approval under Section 801 of the Act. The President signed the order on October 23, 1971, thus signifying approval (Pet. App. 12), and the decision was released.

3. On IAF's petition for review, the Board contended that under Sections 801 and 1006(a) of the Act (49 U.S.C. 1461, 1486(a)), and *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, the decision as approved by the President was not reviewable. The court of appeals agreed and dismissed the appeal in a *per curiam* order (Pet. App. 15).

ARGUMENT

The court of appeals correctly decided this case and the petition raises no issue warranting further review.

1. Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)) expressly withholds from the courts of appeals jurisdiction to review "any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801." The order which petitioner attacks was an "order in respect of [a]

[5] While not necessary to its decision, the Board also determined that IAF could not in any event be granted an authorization under Part 297. It ruled that IAF, which is in fact controlled by a foreign national, is not a citizen of the United States within the meaning of Section 101(13), even though it met the literal requirements of that statutory provision (Pet. App. 5–6).

foreign air carrier," since it granted Daetwyler's application to renew his foreign air carrier permit. Orders granting or denying such permits must be submitted to the President for approval under Section 801 of the Act and the order was in fact approved by the President. Thus, Section 1006(a) precludes any appellate review of this order.

In disposing of matters subject to Presidential approval under Section 801, the Board's role is simply that of advisor to the President. In performing this role, the Board prepares an opinion setting forth its recommended disposition of the case and the reasons therefor. The opinion, together with the formal order effectuating it, is then transmitted to the President prior to publication. If the President approves he so indicates simply by signing the order. Upon approval, the opinion and order are published as the final and effective decision in the case, a decision which "derives its vitality from the exercise of unreviewable Presidential discretion." *Waterman, supra,* 333 U.S. at 113.

It is true that Section 1006(a), which refers only to "foreign air carriers," does not literally cover applications by citizen air carriers. But that makes no difference here. For in this case, even assuming that IAF is a citizen air carrier (see n. 5, *supra*), the two aspects of the decision to renew Daetwyler's Section 402 permit and reject IAF's alternative request for Part 297 authority were functionally inseparable. The applications were mutually exclusive. The renewal of Daetwyler's permit was based on the rejection of IAF's request for authority to perform identical services. Conversely,

if the Board had determined that IAF's request should be granted, it would have been required to recommend to the President that Daetwyler's application be denied. If the court of appeals had undertaken to review the President's decision on IAF's application, the congressional purpose embodied in Sections 801 and 1006 of the Act to foreclose judicial review of such decisions would have been frustrated.

This principle has been recognized in comparable situations. In *Trans World Airlines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 66 (C.A. 2), certiorari denied *sub nom. Sparks* v. *Civil Aeronautics Board,* 340 U.S. 941, the order involved the transfer of a temporary certificate for foreign air transportation and the acquisition of the assets of one carrier by another. The court held that the certificate transfer required Presidential approval, but assumed that the asset acquisition would ordinarily be subject to judicial review. The court held, nevertheless, that "where, as in the present case, the acquisition of assets and the transfer or amendment of a certificate are inextricably mingled in the same proceeding, we think that the Congressional purpose to grant the President discretion as to overseas air transportation would be thwarted to permit judicial review of that portion of the order relating to acquisition of assets." *Id.* at 71.

2. Even if the denial of the IAF application were viewed as a divisible part of the order, the *Waterman* decision precludes review. That case involved a citizen air carrier which had been denied a certificate to engage in foreign air transportation. Section 1006(a)

did not literally preclude judicial review because a citizen air carrier was involved. Nevertheless, in the light of Congress's purpose, as expressed in Section 801, to have such applications considered by the President as he is responsible for direction of the nation's foreign policy, judicial review of the Board's decision prior or subsequent to his action, or review of the President's action itself, was held to be inconsistent with the statute's objectives. It would place courts in a position of reviewing "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." 333 U.S. at 111.[6]

Although Section 801, which requires Presidential approval for citizen air carrier certificates to engage in foreign air transportation, is not applicable to a Part 297 exemption authorizing foreign air transportation, a Presidential decision to approve the denial of such an exemption has the same effect as a decision to deny a certificate to engage in foreign operations. The prin-

[6] Some subsequent decisions of the courts of appeals have held that the *Waterman* rule does not preclude judicial review to determine whether an order involving foreign operations of citizen carriers is *ultra vires*. *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349 (C.A. D.C.); *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, 380 F. 2d 770 (C.A. 2), affirmed by an equally divided Court *sub nom. World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 461. That exception to the *Waterman* rule would not be applicable in this case because there is no question that the Board has authority to grant or deny Part 297 applications. Moreover, the exception is not applicable to orders involving foreign air carriers. Cf. *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, 392 F. 2d 483, 493 (C.A. D.C.)

ciples underlying *Waterman* should apply to any attempt to subject such a decision to judicial review.

The petitioner apparently does not dispute that the decision below is in accordance with established precedent, but, in effect, urges the court to reconsider *Waterman,* which has stood for more than 25 years without legislative modification (Pet. 17). We submit that there is no reason to do so. The non-severable nature of the Board's order, discussed above (pp. 9–10), is itself sufficient to support the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1974.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, as amended (49 U.S.C. 1301, *et seq.*):

* * * * *

TITLE VIII—OTHER ADMINISTRATIVE AGENCIES

THE PRESIDENT OF THE UNITED STATES

Sec. 801 (49 U.S.C. 1461). The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

* * * * *

TITLE X—PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006 (49 U.S.C. 1486). (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition therefore.

* * * * *

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